RECEIVED
JAN 11 2010
Attorney General Office
Tax Division

9

IN THE CIRCUIT COURT OF NICHOLAS COUNTY, WEST VIRGINIA

ROBIN D. DAVISSON,

Petitioner,

vs.// Complaint No.: 09-AA-1

JOE MILLER, Commissioner of the
West Virginia Division of Motor Vehicles,

Respondent.

CIRCUIT CLERK
NICHOLAS COUNTY, WV
2009 DEC 30 AM 11:45

ORDER REVERSING COMMISSIONER'S FINAL ORDER AND REINSTATING PETITIONER'S DRIVERS' LICENSE AND DRIVING PRIVILEGES

On the 7th day of December, 2009 came the Petitioner in person, and by counsel, Gregory W. Sproles, and came the Respondent, Joe Miller, Commissioner of the West Virginia Division of Motor Vehicles by counsel, Ronald Brown, Assistant Attorney General, for Final Hearing upon the Petitioner's Petition for Judicial Review of the Final Order of the Respondent which revoked the Petitioner's drivers' license while driving under the influence of alcohol.

Thereupon, the Court did proceed to review all matters of record and did hear the oral arguments and positions of the parties.

Based upon all matters of record, the arguments of the parties and the applicable law the Court does hereby make the following:

FINDINGS OF FACT

1. The criminal complaint which charged the Petitioner with driving while under the influence of alcohol was dismissed in the Magistrate Court in Nicholas County, West Virginia.

2. The Respondent's Final Order did not comply with the provisions of *Choma v. West*

Virginia DMV, 210 W.Va. 256, 556 S.E. 2d 310 (2001) in that it gave no weight to the dismissal of this criminal charge, even though the West Virginia Supreme Court of Appeals required, in *Choma, supra,* that the disposition of the underlying criminal charge be given substantial weight in an administrative revocation proceeding of a person's driver's license.

3. The Petitioner's driver's license as initially revoked for not only driving under the influence of alcohol, but also refusing to take a designated secondary chemical test.

4. The Respondent accepted the Petitioner's testimony that she was unable to provide a sufficient breath sample because of her medical condition and dismissed the revocation of the Petitioner's driver's license for an implied consent revocation.

5. Evidence was presented from both the Arresting Officer and the Petitioner, along with a witness, regarding whether the Petitioner was driving while under the influence of alcohol. Evidence was also presented by the Petitioner and the Arresting Officer regarding the administration and results of field sobriety testing.

6. The primary, if not exclusive, basis for the finding that the Petitioner drove a motor vehicle while under the influence of alcohol was the testimony of the Arresting Officer relating to the Petitioner's performance on such field sobriety tests.

7. A videotape was made by the Arresting Officer of the field sobriety tests which the Petitioner performed at the direction and request of the Arresting Officer.

8. The burden of proving that the Petitioner drove under the influence of alcohol was on the Arresting Officer.

9. The Court specifically finds that when an administrative revocation of a person's driver's license is based solely on the observations of the Arresting Officer and a videotape of the person alleged to have been driving under the influence of alcohol was made of such

observation, and such videotape is not introduced by the Arresting Officer, an adverse inference arises that such videotape would be detrimental or adverse to the testimony of the Arresting Officer.

10. There was insufficient evidence, based upon the totality of the record and evidence, to revoke the Petitioner's driver's license, especially considering the evidence presented by the Petitioner at the underlying administrative hearing and the failure of the Arresting Officer to introduce a videotape of his observations of the Petitioner and her performance of field sobreity testing.

CONCLUSION

Based upon all the foregoing the Court does hereby make the following:

CONCLUSIONS OF LAW

1. Based upon the totality of the evidence presented and the failure of the Arresting Officer to introduce the videotape of the Petitioner after being stopped and during the administration of the field sobriety tests there was insufficient evidence in the record to revoke the Petitioner's driver's license.

2. The Court further finds that when an administrative revocation of a person's driver's license for driving under the influence of alcohol is based solely on the observations of the Arresting Officer and there is a videotape of the actions of the Petitioner and her performance of field sobriety testing and such videotape is not introduced into evidence at the administrative hearing by the Arresting Officer an adverse inference arises that the videotape would be detrimental to or contrary to the testimony of the Arresting Officer.

3. The adverse inference which arises as a result of the Arresting Officer failing to introduce the videotape of the Petitioner after she was stopped, coupled with the testimony of the

CIVIL ORDER BOOK 166 PAGE 492
ENTERED 12-30-09

Petitioner and a witness on her behalf and the fact that the Commissioner accepted the testimony of the Petitioner that she was unable to give a sufficient sample on the secondary breath test compels the conclusion that there was not sufficient evidence presented to revoke the Petitioner's driver's license for driving under the influence of alcohol.

Based upon all the foregoing the Court is of the opinion and it is hereby ORDERED that Final Order of the Commissioner, with an effective date of August 24, 2009, be reversed in its entirety and the driver's license and driving privileges of the Petitioner be reinstated.

To all adverse rulings the parties object and except by the accompanying Findings of Fact:

It is further Ordered that the Clerk of this Court forward a certified copy of this Order to the following:

Joe Miller, Director
West Virginia Division of Motor Vehicles
Safety and Enforcement Division
1800 Kanawha Boulevard East
State Capitol Building 3
Charleston WV 25317-0010

Gregory W. Sproles (WV State Bar ID #3540)
Breckinridge, Davis, Sproles & Chapman, PLLC
509 Church Street
Summersville, WV 26651

Ronald Brown (WVSB # 501)
Assistant Attorney General
WV State Capital Complex, Building 1, Room W-435
Charleston, WV 25305

To all adverse rulings the parties object and except.

Entered this the 30th day of December 2009.

CIVIL ORDER BOOK 166 PAGE 493
ENTERED 12-30-09

JUDGE

Prepared by:

Gregory W. Sproles (WV State Bar ID #3540)
Breckinridge, Davis, Sproles & Chapman, PLLC
509 Church Street
Summersville, WV 26651
(304) 872-2271

A true copy certified this 30 day of Dec., 2009

DEBBIE FACEMIRE CIRCUIT CLERK
Nicholas County Circuit Court
Summersville, WV 26651
By_____, Deputy

Approved by:

Ronald Brown (WVSB #501)
Assistant Attorney General
WV State Capital Complex, Building 1, Room W-435
Charleston, WV 25305

CIVIL ORDER BOOK 166 PAGE 494
ENTERED 12/30/09